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Supreme Court of the United States

October Term, 1961

No. 598

DRAKE BAKERIES INCORPORATED,

Petitioner,

against

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Cases Cited

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Respondent raises no question concerning the formal matters set forth at pages 1 and 2 of the petition.

Statement of Matters Involved

Petitioner's quotations from the collective bargaining agreement involved, on pages 3-5 of the petition, are accurate as far as they go. Omitted, however, from Article VII at the top of page 5 of the petition is sub-section "(b)" which is set forth at the footnote at page 8a of Appendix B to the petition, as a note in Judge Swan's opinion, namely,

> "It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, *subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike* or work stoppage." (emph. supp.)

There are errors in the statement of facts (pp. 5-6), which it is necessary to rectify.

We strongly object to the petitioner stating, as if it were a fact, although without reference to the record, that "the Union chose to cause its members to engage in a one-day strike on January 2, 1960" (Pet. p. 5). The Union categorically denied, under oath, that there was a strike (App. 3b-4b).* Moreover it proved, without any contradiction, that it was actively seeking to use the grievance machinery to resolve the dispute.

The difference between the parties that led to this lawsuit arose in December of 1959, when the employer proposed, and then threatened to impose unilaterally, amendment of the past practice and understanding between the parties concerning holiday weekends. There was an exchange of telegrams, in one of which the Union declared: "If you do not retract position, we shall demand arbitration". The opinion (later withdrawn), of the Court of Appeals by retired Judge Swan unfairly states: "The Union • • • did not request the designation of an arbitrator" (Pet. 9a). The fact is, and the record shows, that the Union could not, under the contract, request the designation of an arbitrator until its primary grievance steps had been exhausted and the record shows that these preliminaries were being actively pressed when this action was begun (App. 15b).

One of these steps, for example, was the submission "in writing, and as a prelude to arbitration [of], its grievance as to the proper rate of pay for the employees who reported December 26th", on which date the Union contended those members did not have an obligation to work (App. 4b).

A significant omission from petitioner's "Statement" relates to an incident of August, 1959, unconnected with the

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* References "App." are to the Union's Appendix below.

disagreements out of which this action arose. It was shown, and it was undisputed, that six months before the action was begun, and during the life of this very collective bargaining agreement, the company claimed that the Union had called an "over-time strike" (App. 6b).

The company, petitioner here, in connection with *that* incident construed the contract to require it to go to arbitration over its grievance and it applied to the New York State Mediation Board for the designation of an arbitrator. It was undisputed that that Board, as a matter of long-established administrative practice and routine "handles arbitrations arising from claims of violations of various 'no strike' clauses" (App. 7b). This practical construction of the contract by the petitioner resulted in an assumption of jurisdiction by the Board, the designation of an arbitrator, and, ultimately, the settlement of the dispute (App. 14b).

All this was before Judge Ryan, when he granted the original motion to stay the action pending arbitration.

REASONS FOR DENYING THE WRIT

A. First Question Presented:

Even if it were not for this Court's granting of certiorari in *Atkinson* v. *Sinclair Refining Company No. 430*, October Term, 1961, and even if it were not for the internal division in the Second Circuit disclosed by its final *per curiam* decision of September 12, 1961, candor would compel us to say that the varying decisions in the various Circuits makes the First Question presented seemingly proper for review by this Court. To this statement, however, we make two qualifications.

In the first place, the difference among the Circuits, if analyzed out by careful scrutiny of the various contract

provisions and fact situations involved, might prove to be more apparent than real. The difference, if any, is not one in the interpretation of contract language. It is a difference in philosophical approach and on contract language many of the cases can be reconciled; others can be distinguished on the basis of an admission, not here present, that a strike had occurred, etc.

In the second place, the *per curiam* decision below is clearly correct on the record here presented. This Court denied certiorari (354 U. S. 911) in *Signal-Stat Corporation* v. *Local 475*, 235 F. 2d 298, and the contract language involved in that case is less favorable to the Union's position than the contract language in the present case.

With all due deference to retired Judge Swan and Judges Lumbard and Moore, there is literally ***nothing*** in the Drake-Local 50 contract which evinces an intention to exclude alleged violations of the no-strike clause from the ambit of the grievance-arbitration machinery. The last sentence of Article VII, quoted above (p. 1) evinces a contrary intention. There was no concession here, as there may have been in some of the midwest cases, that there had, in fact, been a strike. The employer, petitioner here, has itself construed the agreement as including an alleged "over-time strike" as a grievance. The withdrawn opinion of the Court of Appeals is seemingly based on an unstated hostility to arbitration, *per se*, rather than on contract language.

We do appreciate that the correctness of a decision is no more a reason for refusing the writ than the fact that a decision is wrong is necessarily a reason for granting the writ.

B. The Second Question Presented:

As a result of recent legislation, there are now nine active judges in the Second Circuit and it is not likely that an even division will recur on the extremely rare occasions

when it grants an *en banc* hearing. The question presented is a freak; it is one of rare curiosity rather than of general interest. In any event, it is a question which need not be settled by this Court: there is no reason why each Circuit should not be free to develop and apply its own rule with respect to such a rare and unusual division.

CONCLUSION

For the foregoing reasons, this petition should be denied. If, however, the Court should determine to grant review, the case should be set down for argument with No. 430.

Respectfully submitted,

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